STATE OF MICHIGAN

COURT OF APPEALS

DETROIT DEPARTMENT OF WATER AND SEWERAGE and AFSCME COUNCIL 25 LOCAL 207,	UNPUBLISHED September 29, 2011
Respondents-Appellees,	
v	No. 298364 MERC
DONALD LE PAUL HOOKS,	LC Nos. 08-000024; 08-000093;
Charging Party-Appellant.	08-000195

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Charging party Donald Le Paul Hooks, proceeding in propria persona, appeals as of right from a decision and order of the Michigan Employment Relations Commission ("MERC"), which affirmed the decision and recommended order of an administrative law judge dismissing Hooks's unfair labor practice charges against the Detroit Water & Sewerage Department ("DWSD") and AFSCME Council 25, Local 107 (the "Union"). For the reasons set forth in this opinion, we affirm.

This case arises from Hooks's unsuccessful attempt to have the DWSD accommodate his requests for uniform items and assignment to the midnight shift when he was offered an opportunity for employment following his voluntary resignation approximately two years earlier. Following discussions with a supervisor over these issues, Hooks was given a date to report to work and informed that failure to do so would result in him being treated as a voluntary quit. The ALJ found, and the record supports that Hooks never reported to work.

In May 2008, Hooks filed charges against the DWSD alleging that the DWSD had discriminated against him or retaliated against him while he was engaged in union or protected concerted activity. Hooks also filed charges against the Union, alleging that the Union had violated Section 10 of PERA.

Following a hearing on the matter, the ALJ recommended that the MERC dismiss the charges. With respect to the DWSD, the ALJ reasoned that Hooks "has not alleged that the City of Detroit discriminated or retaliated against him because of his union or other protected concerted activity while he was an employee of the City, nor has Hooks provided any facts which would support a finding that the Employer had a retaliatory motive for failing or refusing

to reinstate him in December 2007." With respect to the Union, the ALJ reasoned that the charge should be dismissed for failure to state a claim because Hooks failed to allege "facts showing that the Union acted arbitrarily, discriminatorily or in bad faith[.]" The ALJ stated:

> The record indicates that Charging Party resigned his employment with the City of Detroit in July of 2005. The adverse employment action about which Hooks complains occurred in December of 2007, more than two years after his resignation and five months after his eligibility for reinstatement expired under the terms of the collective bargaining agreement. Under such circumstances, the Union owed no further duty of representation to Charging Party as he was no longer a member of the bargaining unit at the time of the alleged unfair labor practice.

On November 10, 2008, Hooks filed 20 specific exceptions to the recommended decision and a 48-page brief in support of his exceptions. On the same date, he filed amended charges against the Union and the DWSD. He also resubmitted his previous response to the motion for summary disposition and attached numerous exhibits.

On March 11, 2010, the MERC issued a decision and order dismissing the charges.

The MERC explained that the two charges from alleged contract violations resulted from the employer's denial of Hooks's requests for uniforms and for assignment to the midnight shift. The MERC stated that only certain actions by the employer were actionable under the PERA. Mere unfairness or an allegation of a violation of the CBA does not state a valid claim under the PERA. The MERC agreed with the ALJ that Hooks's charges did not show that DWSD's actions were intended to discourage, interfere with, or retaliate against Hooks for engaging in protected activity. The MERC explained that the claims were unsubstantiated, the allegations conclusory, and the "catch phrases" "lack[ing] any reasonable correlation with the instances of alleged misconduct asserted in his charges."

With respect to the charge against the Union, the MERC agreed with the ALJ that Hooks was not entitled to representation because, having never been rehired, he was not a member of the bargaining unit. The MERC further reasoned that even if he were a member, his claim would fail because his allegations were too conclusory and largely consisted of catch phrases. Thereafter, Hooks moved for reconsideration and for reopening of the record. The MERC denied his motions.[1] This appeal ensued.

The applicable standard of review that we apply when reviewing decisions of the MERC is aptly stated in *Grandville Muni Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996), as follows:

[1] In the order, the MERC refers to its March 11, 2010, decision as including a determination that the charges "were barred by the six month limitations period . . . ." The March 11, 2010, decision does not discuss a limitations period.

> The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e); MSA 17.455(16)(e). The commission's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. The MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL 24.306(1)(a), (f); MSA 3.560(206)(1)(a), (f). [Citation omitted.]

This Court affords less deference to the MERC legal rulings because review of legal questions remains de novo. *Mich Ed Ass'n v Christian Bros Institute of Mich*, 267 Mich App 660, 663; 706 NW2d 423 (2005). This Court "will set aside a legal ruling by MERC if it runs afoul of the law or is otherwise tainted by a serious legal error." *Id.*

Duty of Fair Representation.

A Union, acting as the exclusive agent for employees covered by a bargaining unit, has a duty to fairly represent all members of a designated unit. This duty was described and analyzed in *Vaca v Sipes*, 386 US 171, 176-177; 87 S Ct 903; 17 L Ed 2d 842 (1967). As stated in *Vaca*, a union's statutory duty of fair representation traditionally runs only to members of its collective bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit. *Id.* at 182. Our Supreme Court has relied on similar federal precedents when stating that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith." *Goolsby v Detroit*, 419 Mich 651, 661; 358 NW2d 856 (1984) relying on *Humphrey v Moore*, 374 US 335, 342; 84 S Ct 363; 11 L Ed 2d 370 (1964). Thus, before one can maintain an action against a Union for breach of its duty of fair representation, they must demonstrate that they are a member of the union's collective-bargaining unit. See, *Schneider Moving & Storage Co v Robbins*, 466 US 364, 376 n 22; 104 S Ct 1844; 80 L Ed 2d 366 (1984), quoting *Vaca*, *supra*, at 342. Reviewing the evidence submitted in this matter, it is readily apparent that Hooks has failed to demonstrate that the MERC erred in determining that the Union did not owe him a duty of fair representation because, having never been rehired, he was not a member of the bargaining unit. A union does not owe a duty of fair representation to a mere job applicant. See, e.g., *Felice v Sever*, 985 F2d 1221 (CA 3, 1993). Because Hooks has not presented a cogent argument explaining why he should be considered a member of the bargaining unit, we affirm the MERC's dismissal of the charges against the Union.

Actions against the DWSD.

Hooks has similarity failed to prove that the MERC erred in determining that the allegations against the DWSD were insufficient to show that it intended to discourage, interfere with, or retaliate against Hooks for engaging in protected activity. Hooks relies on the following description of a prima facie case set forth in *NLRB v Fluor Daniel, Inc*, 332 F3d 961, 968 (CA 6, 2003):

> "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or

> training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation." [*Id*., quoting *FES (a Division of Thermo Power) & Plumbers & Pipefitters Local 520 of the United Association*, 331 NLRB No. 20; 2000 WL 627640 (May 11, 2000).]

Fluor Daniel is not applicable to this case. *Fluor Daniel* involved a union organizing technique commonly referred to as "salting." Following "plants" being sent to an unorganized facility, the union would then have qualified union employees apply for positions within the company, stating on their applications that their occupation was that of a "voluntary union organizer." When the employer failed to hire such applicants, the union would bring an action claiming that the employer failed to hire the applicants based on their status of a voluntary union organizer. The genesis of the claim was that these applicants were discriminated against in the hiring process solely on the basis of their union activities. The present case stems from Hooks's unsuccessful attempt to have the DWSD accommodate his requests for uniform items and for assignment to the midnight shift. Hooks contends that uniforms were necessary, but he concedes that the DWSD was no longer providing them to other personnel in the position. There is no contention that the provision of uniforms was a topic of dispute between the Union and the DWSD, hence such actions were not related to any union sanctioned activity. Furthermore, there is no evidence that Hooks's position was shared by the Union. Even assuming, arguendo, that Hooks's demand for uniforms was a factor in his aborted hiring by the DWSD, the DWSD's unfavorable response to Hooks's position does not demonstrate any "antiunion animus." Contrary to the facts in *Fluor Daniel* where prospective employees were not hired based on their union activities, Hooks has failed to demonstrate the he was engaged in any union activities at the time that the DWSD treated him as a voluntary quit.

With respect to shift assignment, Hooks acknowledged that the DWSD told him that the midnight shift was not available. Hooks did not allege that representation was false. He also did not demonstrate that as a former employee who voluntarily resigned, he was entitled to "bump" current employees to accommodate his requested shift. Thus, there is simply no nexus between the DWSD's failure to accommodate Hooks's request and any antiunion animus.

Affirmed. Appellees, having prevailed in full, may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello